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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 65

J. C. CROCKETT, PETITIONER

v.

THE UNITED STATES OF AMERICA

No. 66

J. C. CROCKETT, PETITIONER

v.

GEORGE H. MCELROY AND PETER A. HANNA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinions of the Circuit Court of Appeals (R. 186–206) are reported in 116 F. (2d) 646.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fourth Circuit was

entered December 21, 1940 (R. 207). A petition for rehearing was denied February 6, 1941 (R. 207–208). The petition for a writ of certiorari was filed May 1, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In actions for personal and property damages resulting from a collision between petitioner's car and a government vehicle, the jury returned verdicts against petitioner. The question presented is whether there was any evidence that petitioner's car was being driven on the business of petitioner at the time of the accident.

STATEMENT

The various suits involved herein were instituted in the United States District Court for the Southern District of West Virginia, in November 1939, to recover for personal and property injuries resulting from an automobile accident (R. 1–3, 158–159, 166–169).[1] The accident involved three cars, one owned by petitioner Crockett, one by the United States, and one by Peter A. Hanna. The United States sued for damages to its car; McElroy, the agent of the United States, sued for personal injuries; while Hanna sued for both personal injuries and property damages.

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[1] By agreement of counsel the various cases were ordered to be consolidated and heard together (R. 13–15, 174–175).

Petitioner operates an automobile sales business under the name of Central Motor Sales, at Princeton, West Virginia (R. 8, 169).[2] For over a year Herbert Holt[3] acted as a salesman for petitioner, working on a commission basis, at such times as Holt desired to work (R. 97, 98, 117). Holt had authority to use petitioner's cars for business purposes (R. 98) and while he usually consulted petitioner before demonstrating a car to a prospective purchaser (R. 99), Holt had authority to sell any of petitioner's cars without special authority and to seek out prospective purchasers for this purpose (R. 122–125).

On the morning of February 20, 1939, Holt arranged with petitioner to drive one of petitioner's cars, a 1936 model Plymouth sedan, to Hiawatha, West Virginia, in order to negotiate a deal with one Hale, a prospective customer (R. 117–118). Instead of proceeding directly to Hiawatha, Holt drove down the main street of Princeton and stopped to talk to Frank Ellison (R. 81, 118), a friend of his (R. 81). Ellison got into the car and Holt inquired as to a prospect, a close neighbor of Ellison, to whom Holt had previously attempted to sell a car (R. 118). After fifteen or twenty

[2] In the various complaints it was erroneously alleged that the Central Motor Sales was a corporation (R. 1, 158).

[3] Herbert Holt was erroneously sued as Robert Holt. By order of the court the pleadings were amended to show correctly the name of defendant as Herbert Holt (R. 13–14).

minutes, at about nine o'clock, the two men were joined by Robert Weikel (R. 76, 118–119), a friend of Ellison, but unknown to Holt (R. 85, 119). Holt attempted to interest Weikel in buying a car (R. 82) but, on failing to do so, drove to a coal yard at Weikel's request to drink Weikel's liquor (R. 76, 89, 119). After finishing the bottle, Holt drove the men back to town and more liquor was bought, Weikel paying for it (R. 77, 89, 119).[4]

Holt then drove the men to an old road and the drinking continued (R. 77, 90, 91, 119). During this time Holt approached Weikel again about purchasing a car (R. 75, 80, 86, 120–121). After about an hour and a half, at some time between 10:30 A. M. and 2:30 P. M. (R. 77–78, 89), they returned to Princeton where Weikel supplied the money for more liquor (R. 77). The men then drove to a filling station, where, according to Ellison's testimony, Holt requested Ellison to drive (R. 78). Ellison declined, not having a driver's license, and Weikel drove at Ellison's suggestion (R. 78, 83, 87).[5] At about this time, Holt "passed out" from excessive drinking (R. 78, 84–85, 87, 88) and remained stretched out on the rear seat of the car up to the time of the accident (R. 26, 38, 41, 42, 47, 84–85, 107, 113, 115).

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[4] Weikel testified that he supplied the money at Ellison's request (R. 89).

[5] Weikel testified that Ellison said to him: "Bob, drive it and see how you like it" (R. 87).

Weikel drove to a sandwich shop, about three-quarters of a mile from Princeton, and Ellison and Weikel went inside (R. 42, 78, 88, 109, 110). After staying at the sandwich shop a short time Weikel and Ellison, accompanied by a girl named Virgie Keatley, returned to the car, and drove to a beer garden about five miles distance from the sandwich shop, in order to have a "party" (R. 39, 40, 78, 79, 84, 92, 111, 113, 114, 115, 116). Both men and the girl were obviously under the influence of liquor (R. 47, 84, 91, 107, 111, 114, 116). Ellison drove (R. 40, 42, 47, 79, 108, 113–114, 115), and sometime after leaving the sandwich shop, between 3 and 5 P. M. (R. 24, 39, 73, 112, 114, 116, 128), collided with respondent's car.

The accident occurred when Ellison, driving at a very high speed, passed a truck at a crest of a hill. The respondent McElroy, an employee of the Federal Bureau of Investigation, driving on business a car owned by the United States, was proceeding in the opposite direction and did not have sufficient time to avoid crashing into petitioner's car. The respondent Hanna was driving closely behind McElroy and was unable to avoid running into the rear of the government car (R. 25, 32, 40–41, 44–45, 68, 72, 128–132, 136–139).

At the close of both the plaintiffs' and defendants' evidence, motions on behalf of petitioner and others for a directed verdict were overruled by the

Court (R. 104–105, 144–145).[6] The case was submitted to the jury, which was instructed on the issue of *respondeat superior* to determine whether the plaintiffs had proved—

> by a preponderance of the evidence * * * that at the time of the accident involved * * * the said Plymouth sedan was being operated on the business of J. C. Crockett, or for some purpose connected with the business of the said J. C. Crockett (R. 152).

The jury found as follows: For the United States against Crockett, Holt, and Ellison, in the sum of $575.00; for McElroy and Hanna, against Crockett, Holt, and Ellison, in the sum of $2,795.33 and $3,116.50, respectively.[7] Motions for new trial were overruled and judgments were entered in accordance with the verdicts of the jury (R. 17–19, 178–180). On appeal, the Circuit Court of Appeals for the Fourth Circuit affirmed, Judge Dobie dissenting (R. 186–206).

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[6] On the issue of the responsibility of petitioner for the negligence of the occupants of his car, Hanna adopted as his evidence the same testimony as introduced by the other plaintiffs (R. 144).

[7] The United States and McElroy also sued Hanna (R. 1, 158) and the latter counterclaimed against McElroy (R. 168). The jury reached a verdict in Hanna's favor on the suit against him by McElroy and the United States, and in McElroy's favor on Hanna's counterclaim (R. 177).

ARGUMENT

Petitioner concedes that Ellison's negligence was the responsible cause of the collision and makes no contention that petitioner is absolved from liability merely by reason of the fact that the car was driven by a person other than the agent to whom it had been entrusted (Pet. pp. 49–51). Petitioner contends, however, that there was no evidence that the car was being operated on his business or with the knowledge and consent of his agent at the time of the accident.[8] It would seem sufficient answer that this Court will not review the question of the sufficiency of the evidence where the jury's verdict has been approved by both the trial court and the court below. *El Paso R. R. Co.* v. *Vizard,* 211 U. S. 608, 611; *Story Parchment Co.* v. *Patterson Co.,* 282 U. S. 555, 560; *Seaboard Air Line Ry.* v. *Renn,* 241 U. S. 290, 294–295; *cf. Brewer Oil Co.* v. *United States,* 260 U. S. 77, 86; *Morimura* v. *Tabeck,* 279 U. S. 24, 27; *Altoona Publix Theatres, Inc.* v. *American Tri-Ergon Corp.,* 294 U. S. 477, 480. Even assuming that this question is now open to review in this Court, however, the decision below, we submit, is correct.

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[8] Petitioner also challenges the ruling of the court below that petitioner knew, or ought to have known, that Holt was addicted to drinking and could not safely be permitted to drive an automobile and hence that petitioner was personally chargeable with negligence. It is clear, however, that this was only an alternative ground of decision and that the court below also held the petitioner liable for the negligence of his agent (R. 190–194, 195–196).

drive the car for his own purposes. In two of them, *Jenkins* v. *Spitler,* 120 W. Va. 514, 516–517, and *Shrimplin* v. *Simmons Auto Co.* (W. Va.), 9 S. E. (2d), 49, 52, the *Cochran* case was cited with approval.

The test of the employer's liability under West Virginia law would thus seem to be whether the trip was undertaken to promote goodwill and seek out customers in furtherance of the employer's business. In this view, there was substantial evidence to support the jury's verdicts, whether the question of the sufficiency of the evidence is one of local law or, as the court below held (R. 192–193), is for the independent determination of the federal courts. *Gorham* v. *Mutual Benefit Health and Accident Assn.,* 114 F. (2d) 97, 99; cf. *Herron* v. *Southern Pacific Co.,* 283 U. S. 91. There was ample evidence that Holt was authorized to seek out prospective purchasers without specific authority (R. 122) and there was evidence from which the jury could have found that Holt was likewise authorized to pick up friends in order to secure information as to possible customers (R. 124). From the testimony that Holt inquired of Ellison as to a prospective customer (R. 118), and at least twice endeavored to sell Weikel a car (R. 75, 80, 82, 86, 120–121), the jury could also have found that the trip on which the accident occurred was undertaken to further the petitioner's business. And while Holt was ap-

parently unconscious when the trip was continued from the sandwich shop, the jury was entitled to conclude that Ellison's driving of the car was within the license extended by Holt's previous invitation (R. 78). There was thus ample evidence that, while the entire journey served the personal pleasure of the parties, the trip was initiated and continued, in part at least, as a means of promoting the sale of petitioner's cars. Cf. *Shahan* v. *Jones,* 115 W. Va. 749.

2. The court below correctly construed the applicable law of West Virginia. Under that law Holt's authority to seek out customers and contact friends for business purposes included authority to make some digressions from his business at the request of a friend or prospective purchaser in order to facilitate sales. Whether the journey in question went beyond the permissible limits of his employment is a question of degree turning on the particular facts of this case. The jury's verdicts have been approved by both courts below. In these circumstances, the question of the sufficiency of the evidence would not seem to warrant the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941